

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE: SHORENSTEIN HAYS-	§	
NEDERLANDER THEATRES	§	
LLC APPEALS	§	Nos. 596, 2018 and 620, 2018
	§	
	§	CONSOLIDATED
	§	
	§	Court Below:
	§	Court of Chancery
	§	of the State of Delaware
	§	
	§	C.A. Nos. 9380-VCMR and
	§	2018-0701-TMR

Submitted: May 8, 2019  
Decided: June 20, 2019

Before **VALIHURA, SEITZ**, and **TRAYNOR**, Justices.

Upon appeal from the Court of Chancery. **AFFIRMED** in part, **REVERSED** in part, and **REMANDED**.

Tammy L. Mercer, Esquire, Jack B. Jacobs, Esquire, Martin S. Lessner, Esquire, and M. Paige Valeski, Esquire, Young Conaway Stargatt & Taylor, LLP, Wilmington, Delaware. Of Counsel: Matthew L. Larrabee, Esquire (*argued*), Benjamin M. Rose, Esquire, Dechert LLP, New York, New York; Michael S. Doluisio, Esquire, Dechert LLP, Philadelphia, Pennsylvania for Appellant/Cross-Appellee *Nederlander of San Francisco Associates*.

Raymond J. DiCamillo, Esquire, Susan M. Hannigan, Esquire, and Sarah T. Andrade, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware. Of Counsel: David B. Tulchin, Esquire (*argued*), Brian T. Frawley, Esquire, and Andrew J. Finn, Esquire, Sullivan & Cromwell LLP, New York, New York for Appellees/Cross-Appellants *CSH Theatres LLC, CSH Curran LLC, CSH Productions, Curran Live, LLC, Carole Shorenstein Hays, Dr. Jeffrey Hays and Thomas Hart*.

**VALIHURA**, Justice:

This is a consolidated appeal of two separate actions, both of which arise from a dispute involving a theater partnership.<sup>1</sup> Robert E. Nederlander, Sr. (“Robert”)<sup>2</sup> controls Nederlander of San Francisco Associates (“Nederlander”), a California general partnership. Carole Shorenstein Hays (“Carole”) and her family control CSH Theatres L.L.C. (“CSH”), a Delaware LLC.<sup>3</sup> Nederlander and CSH each own a fifty-percent membership interest in Shorenstein Hays-Nederlander Theatres LLC (“SHN”), a Delaware LLC that operates theaters in San Francisco under SHN’s Plan of Conversion and Operating Agreement of the Company (the “LLC Agreement”).

In 2010, CSH Curran LLC (“CSH Curran”), an entity that Carole co-manages,<sup>4</sup> purchased the Curran Theatre in San Francisco (the “Curran”). SHN had been operating under a lease from the Curran’s then-owners, the Lurie Company (“Lurie”), since the beginning of the partnership. Carole and her husband, Dr. Jeffrey Hays (“Jeff”) (collectively, the “Hayses”), did not extend that lease with SHN when it expired in 2014.

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<sup>1</sup> *In re Shorenstein Hays-Nederlander Theatres LLC Appeals*, Consol. Nos. 596, 2018 and 620, 2018 (Del. Jan. 9, 2019) (ORDER) (consolidating the separate appeals from C.A. No. 9380 and C.A. No. 2018-0701).

<sup>2</sup> To avoid confusion, this Opinion refers to certain individuals by their first names. We intend no disrespect or familiarity.

<sup>3</sup> The Shorenstein-Hays family controls CSH through CJS Trust-A, which is one of two trusts relevant to this dispute that Carole’s father, and the patriarch of the Shorenstein family, Walter Shorenstein, set up for Carole’s benefit. The other trust is CSH Doule Trust. Carole, her husband, their two children, and Thomas Hart manage those trusts.

<sup>4</sup> Carole purchased the Curran indirectly through CSH Doule Trust. CSH Doule Trust owns CSH Curran LLC, which Carole and Hart manage through CSH Doule LLC, the sole member of CSH Curran.

Thereafter, the Hayses began staging productions at the Curran. In February 2014, CSH sued Nederlander in the Court of Chancery for a declaratory judgment that it had no legal obligation to renew the Curran lease (the “Declaratory Judgment Action”).<sup>5</sup> Nederlander asserted counterclaims against CSH and third-party claims against the Hayses for breaches of their fiduciary and contractual obligations, among other claims.<sup>6</sup> The court held in a thorough July 31, 2018 opinion that there was no enforceable promise to renew the lease of the Curran to SHN, that CSH did not breach the LLC Agreement, and that the Hayses breached their common law fiduciary duties of loyalty (the “Declaratory Judgment Opinion”).<sup>7</sup>

In September 2018, Nederlander sought a preliminary injunction in the Court of Chancery against CSH and the Hayes to prevent them from staging *Dear Evan Hansen* and *Harry Potter and the Cursed Child* (“*Harry Potter*”) at the Curran (the “PI Action”). In the PI Action, Nederlander asserted four counts, but focused its injunction efforts on Count I, which asserted breach of contract claims (based upon the “provisions of Section 7.02 of the LLC Agreement or the contractual fiduciary duties owed to SHN and its members under

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<sup>5</sup> The demand for a declaratory judgment pursuant to 10 *Del. C.* § 6501 was the sole count in CSH’s complaint. *See* App. to Opening Br. at A364–68 (CSH Complaint).

<sup>6</sup> Nederlander’s counterclaims and third party claims included counts of breach of fiduciary duty against the Hayses (Count I), breach of the LLC Agreement against CSH (Count II), fraudulent inducement against CSH and Carole (Count III), breach of contract against CSH and Carole (Count IV), promissory estoppel against CSH, CSH Curran LLC, and the Hayses (Count V), and declaratory judgment with respect to the LLC Agreement pursuant to 10 *Del. C.* § 6501 (Count VI). *Id.* at A422–27 (Nederlander Counterclaims and Third Party Complaint).

<sup>7</sup> *CSH Theatres, L.L.C. v. Nederlander of San Francisco Assocs.*, 2018 WL 3646817, at \*37 (Del. Ch. July 31, 2018) [hereinafter *Declaratory Judgment Opinion*].

### *Addendum*

Finally, we comment on one last point that was addressed by the trial court, but is not an issue raised by the parties on appeal, namely, the deposition misconduct by Carole Shorenstein Hays.<sup>147</sup> In *Paramount Communications Inc. v. QVC Network Inc.*,<sup>148</sup> this Court addressed, in an Addendum, deposition misconduct by a *lawyer* at a deposition. This Addendum addresses a less frequently discussed corollary concerning the duty of counsel who is faced with a *deponent's* inappropriate conduct at a deposition.

In *Paramount*, the Supreme Court, *sua sponte*, addressed misconduct by out-of-state counsel who was representing a director of Paramount Communications in a deposition. That attorney was barred in Texas, was not admitted *pro hac vice*, and did not otherwise appear in the Delaware proceeding representing any party. No member of the Delaware bar was present at the deposition representing any of the defendants or the stockholder plaintiffs.

After examining the deposition transcript, the Supreme Court held that the attorney had abused the privilege of representing a witness in a Delaware proceeding by: (a) improperly directing the witness not to answer certain questions; (b) being extraordinarily

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<sup>147</sup> We comment on this matter “under our ‘exclusive supervisory responsibility to regulate and enforce appropriate conduct of . . . all lawyers, litigants, witnesses, and others’ participating in a Delaware proceeding.” *Kaung v. Cole Nat’l Corp.*, 884 A.2d 500, 507 (Del. 2005) (quoting *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34 (Del. 1994)).

<sup>148</sup> 637 A.2d 34 (Del. 1994).

rude, uncivil, and vulgar; and (c) obstructing the ability of the questioner to elicit testimony to assist the court in the pending matter.<sup>149</sup>

The Supreme Court found the unprofessional behavior to be “outrageous and unacceptable.”<sup>150</sup> After quoting portions of the deposition transcript, we stated:

As noted, this was a deposition of Paramount through one of its directors. Mr. Liedtke was a Paramount witness in every respect. He was not there either as an individual defendant or as a third party witness. Pursuant to Ch. Ct. R. 170(d), the Paramount defendants should have been represented at the deposition by a Delaware lawyer or a lawyer admitted *pro hac vice*. A Delaware lawyer who moves the admission *pro hac vice* of an out-of-state lawyer is not relieved of responsibility, is required to appear at all court proceedings (except depositions when a lawyer admitted *pro hac vice* is present), shall certify that the lawyer appearing *pro hac vice* is reputable and competent, and that the Delaware lawyer is in a position to recommend the out-of-state lawyer. Thus, one of the principal purposes of the *pro hac vice* rules is to assure that, if a Delaware lawyer is not to be present at a deposition, the lawyer admitted *pro hac vice* will be there. As such, he is an officer of the Delaware Court, subject to control of the Court to ensure the integrity of the proceeding.<sup>151</sup>

This Court stated that counsel attending the deposition on behalf of the Paramount defendants had an obligation to ensure the integrity of the proceeding. We stated further that a Delaware lawyer, or a lawyer admitted *pro hac vice*, would have been expected to put an end to the misconduct in the deposition.<sup>152</sup> As in *Paramount*, although this Addendum has no bearing on the outcome of the case, we are compelled to address Hays’s misconduct and the role of her counsel when faced with such a situation.

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<sup>149</sup> *Id.* at 53.

<sup>150</sup> *Id.* at 55.

<sup>151</sup> *Id.* at 55–56.

<sup>152</sup> *Id.* at 56.

The following are excerpts of her deposition testimony. Most of these excerpts were reprinted at the end of the Court of Chancery’s Declaratory Judgment Opinion and formed the basis for the trial court’s award attorneys’ fees and costs:<sup>153</sup>

Q. Have you ever been deposed before?

A. *Yes.*

Q. How many times?

A. *Once.*

Q. When?

A. *I believe it was a while ago.*

Q. What was the matter about?

A. *It was a difference of opinions.*

Q. I’m sorry, go ahead. Were you done with your answer?

A. *Yes.*

Q. A difference of opinion about what?

A. *How best to proceed in one’s lives.*

Q. Was it involving a lawsuit?

A. *Oh, definitely.*<sup>154</sup>

....

Q. Did you ever meet with your counsel in advance of this deposition?

A. *Oh, absolutely.*

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<sup>153</sup> The citations within the excerpts quoted above are to the pages of Hays’s deposition transcript [hereinafter “Hays Dep.”].

<sup>154</sup> Hays Dep. 6:23–7:16.

Q. How much time did you spend with your counsel to prepare for the deposition?

A. *Sufficient.*

Q. How much is sufficient?

A. *The appropriate amount needed.*

Q. Can you give me an estimate of the amount of time?

A. *It was completely enjoyable.*

Q. How many times did you meet with your counsel to prepare for the deposition?

A. *Preparation is always a good thing.*

Q. That wasn't my question. How many times did you meet with your counsel to prepare for the deposition?

A. *I met with them – I'm not understanding the question.*

Q. You told me you met with your counsel to prepare for the deposition.

A. *Sure.*

Q. How many times?

A. *Well, see, I think of time as a continuum. So I think I met with them from the beginning to the end. And the beginning was the start, and then there was the rehearsal, and then there was the preview, and now it's what I think of as the performance. So, in my mind, I'm answering what you're asking. If you could be more specific. Do you want hours?*

Q. Yes.

A. *Oh, I don't wear a watch. So I know the sun coming up in the morning and the moon coming up at night.*

Q. Can you tell me the number of times that you met with your counsel to prepare for the deposition? I'm looking for a number.

A. *Well, I gave you that.*

Q. What was the number?

A. *The number was the beginning to the end.*

Q. How many times?

A. *You know, I think – I don't recall.*

Q: Did you review any documents to prepare for the deposition?

A. *Oh, certainly.*

Q. What documents did you review?

A. *The ones that were put in front of me.*

Q. What were they?

A. *Documents.*

Q. Can you recall any of them?

A. *Yes.*

Q. Tell me which ones.

A. *Many.*

Q. Great. Tell me.

A. *Many, many, many.*

Q. Tell me about them.

A. *Well, they were full of words and communications and –*

Q. Can you identify any of them by date or what type of document it is, or who the sender or recipient was?

A. *No.*<sup>155</sup>

....

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<sup>155</sup> *Id.* at 11:19–14:16.



Q. Did you go to college?

A. *Well, yes.*

Q. Where?

A. *I mean tuition was paid.*

Q. Where did you go?

A. *Oh, I had books from a lot of different places.*

Q. Did you enroll at any of those places?

A. *Oh, sure.*

Q. Where did you enroll?

A. *Many, many universities – not that many – a few.*

Q. So you enrolled in a few universities?

A. *Throughout my years, sure.*

Q. Which universities?

A. *Well, one was here, NYU.*

Q. Any others?

A. *Stanford. I don't recall.*

Q. Did you graduate from NYU?

A. *No.*

Q. Did you –

A. *Well, maybe. It's unclear.*

Q. You're not sure?

A. *You mean do I have a diploma? No. Did I receive enough credits to graduate, is that your question?*

Q. That's a question, that's fine.

A. *Is that your question?*

Q. Sure.

A. *You know, it's been said that I have –*

Q. It's been said that you have what? That you have graduated?

A. *It's been said that.*

Q. Do you have a degree from NYU?

A. *Do I have something like a piece of parchment?*

Q. No. Did you finish the requirements –

A. *Did I receive –*

Q. If you could wait until I finish my question.

A. *Sorry.*

Q. Did you complete the coursework and earn enough degrees [sic] to earn a degree? I don't care if you have a piece of paper on your wall. I want to know, did you earn a degree?

A. *I don't recall.*

Q. You don't recall whether you have a degree from NYU?

A. *Correct.*<sup>156</sup>

. . . .

Q. When did you attend NYU?

A. *Oh, goodness. You see, definitely, definitely in my youth.*

Q. Can you be more specific?

A. *No.*

Q. For how many years did you attend NYU?

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<sup>156</sup> *Id.* at 15:21–18:2.

A. *Again, time is a compendium. So I was there a while.*

Q. Can you be more specific?

A. *No.*

Q. Since you completed your studies at NYU, have you had employment anywhere?

A. *How do you define “employment”?*

Q. You’ve never used the word employment in your life?

A. *I’m just wondering how you define it.*

Q. Have you used the word employment in your life, ever?

A. *I’m asking you.*

Q. You don’t get to ask the questions. I get to ask the questions.

A. *Oh, sorry.*

Q. Have you ever used the word employment in your life?

A. *I’ve used many words.*

Q. Have you used the word employment in your life?

A. *It’s a word I’m familiar with.*

Q. What is your understanding of the word employment?

A. *Well, I think it has to do with – I’m not sure.*

Q. You’re not sure what the word employment means?

A. *Yeah.*

Q. Have you ever worked for any kind of company or somebody who might be referred to as an employer?

A. *Possibly.*

Q. You’re not sure?

A. *I would say sure.*

Q. Who have you worked for? And if you could give this to me in chronological order.

A. *Oh, that's – I could give it to you as best I could.*

Q. Sure.

A. *Okay. So I've worked – just in terms of work or in terms of remuneration?*

Q. Work.

A. *So you – well, I've worked on political campaigns.*

Q. And you consider those political campaigns to be your employer?

A. *Well, I – I considered it to be work. That to me was the question posed to me.*

Q. Let's see if we can start again.

A. *Okay.*

Q. I'm looking for your employment history. This isn't a trick question. Are you able to give me your employment history?

A. *I don't know.*

Q. Have you ever worked at SHN?

A. *I have a deep association with it, yes.*

Q. When you say "a deep association," have you ever worked at SHN?

A. *That's my answer.*

Q. Yes or no, have you worked at SHN? I don't understand your answer.

A. *I answered the question.*

Q. I don't understand your answer. Can you please answer it again?

A. *I'm comfortable with my answer.*

Q. Okay. So you're unwilling to tell me whether you've ever worked at SHN?

A. *My answer reflects the question posed to me.*

Q. I don't even know what that means. My question is, have you ever worked at SHN, yes or no?

A. *I find my answer to be most inclusive.*

Q. I don't understand what that --

A. *And embracing.*<sup>157</sup>

....

Q. Have you ever been arrested?

A. *I don't recall.*

Q. You might have been arrested and you just don't remember?

A. *I've led a long life, very colored.*

Q. Sitting here today, can you tell me whether any of that color involved being arrested?

A. *I don't recall.*

Q. Do you know what SHN is?

A. *They're letters in the alphabet.*

Q. Do you know of a company that goes by SHN?

A. *I certainly have a deep, deep association with it.*

Q. What is SHN, beyond letters in the alphabet? I'm referring to the company.

A. *It's a company – it's a company.*

Q. Is it in the theatre business?

A. *It's a company that has people associated with it.*

Q. Is it in the theatre business?

A. *How do you define "theatre"?*

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<sup>157</sup> *Id.* at 18:9–22:3.

Q. I just want to make clear, I'm asking you if SHN is in the theatre business, and you can't answer that question without further explanation?

A. *Can you ask the question again?*

Q. Sure. Is SHN in the theatre business?

A. *There's many different types of theatres. Are we today in the theatre business? This is perhaps a piece of theatre that's being recorded. So I think, again, I need more context.*<sup>158</sup>

....

Q. When was SHN founded?

A. *At the beginning.*

Q. In what year?

A. *The year it was founded.*

Q. Can you give me a year?

A. *No.*

Q. Who founded it?

A. *I was there.*

Q. What do you mean when you say you were there?

A. *I was there at the very beginning when it was – at the very day one.*

Q. Does that make you a founder?

A. *Does giving birth to a child make you a mother?*

Q. Yes, but that wasn't my question. My question was, the fact that you were there, does that make you a founder?

A. *I believe it's semantics.*

Q. Yeah, well, we're here today about semantics and words matter.

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<sup>158</sup> *Id.* at 23:7–24:19.

A. *Sure.*

Q. So my question is, was your father a founder of SHN?

A. *My – I am the daughter of my father.*

Q. By definition, you are the daughter of your father. My question was, is your father a founder of SHN?

A. *My father and my mother raised me in an environment to have a great love and appreciation of the arts and introduced me to many, many people.*

Q. My question was, is your father a founder of SHN?

A. *That wasn't close, that wasn't close, the answer?*

Q. No.

A. *No?*

Q. No.

A. *Tell me again, was my father –*

Q. Was your father, Walter Shorenstein, a founder of SHN?

A. *He certainly cleared a path for me, and I can't – I don't know what that word means.*

Q. You don't know what the word founder means?

A. *No.*<sup>159</sup>

. . . .

Q. No, my question is specific to this meeting. Did you say during this meeting that you were unappreciated?

A. *Well, I think when you ask for a thank you and you don't get a thank you – so under-appreciated is so . . .*

Q. Mrs. Hays, my question isn't about what the word means. My question is, at this meeting, did you –

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<sup>159</sup> *Id.* at 24:24–27:2.

A. *You're getting yourself agitated.*

Q. Did you say the words – and please stop commenting on me – did you say the words I'm unappreciated or underappreciated? That's my question. Did you say I'm unappreciated, I'm not getting enough appreciation? Did you say something like that?

A. *You're smiling, so I'll answer it. Sure, I did.*<sup>160</sup>

....

Q. Then you write: "Feeling duped by the Stuart Thompsons." Who is Stuart Thompson?

A. *A person who works in the business.*

Q. What does he do?

A. *He's a general manager and producer.*

Q. Of what shows?

A. *Many shows.*

Q. Can you give me his most successful shows?

A. *No.*

Q. Can you give me any of the shows?

A. *I don't recall.*

Q. You don't recall any shows that Mr. Thompson has produced? Is that a no? You were shaking your head.

A. *I don't recall.*

Q. Okay. Had you been duped by Stuart Thompson?

A. *I don't recall.*

Q. It refers to Oskars, O-S-K-A-R-S. What is that a reference to?

A. *I don't recall.*

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<sup>160</sup> *Id.* at 157:20–158:14.



Q. And feeling I was just a slob with Felix. Who is Felix?

A. *I don't recall.*

Q. You understand you're under oath, right?

A. *I recall.*

Q. You recall that you're under oath?

A. *I recall.*

Q. And you're going to tell me you don't know – you can't tell me a single show that Stuart Thompson has produced?

A. *Something I'm sure would be in the deep recesses of my mind. Should we sit and tell – would that be a value to why we're here? Would you like me to do that? Because I can.*<sup>161</sup>

. . . .

Q. Why did you write “Yipppppe de da”?

A. *I like using that word.*

Q. What meaning were you trying to convey?

A. *Yipppppe de da, doo da, you know, a jazz term.*

Q. And what does that mean when it's used in an e-mail like this?

A. *Different beats along the way.*

Q. That's what you meant to convey –

A. *Trumpets, yeah.*

Q. You meant to convey to your husband trumpets?

A. *Sure.*

Q. And what was the significance of trumpets?

A. *Good tone.*

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<sup>161</sup> *Id.* at 282:21–284:16.

Q. What does it have to do with Bullets over Broadway?

A. *Bullets over Broadway* is very, very interesting, because you know what, I was wrong. So when I said more often than not I'm right, here is an example where I'm wrong. It closed on Broadway and lost its 12 to \$15 million investment. So I think the Nederlanders should be more than elated that I'm not part of their esteemed venerable organization of picking hits, because had I done it, whoa, Yippppppe de da.<sup>162</sup>

....

Q. And is it right that the plan is for the season to include Broadway-style shows?

A. *Those were her words. This was a proposal.*

Q. Was that – I'm sorry?

A. *This was a proposal.*

Q. Was that your plan, to show Broadway-style shows?

A. *I'm always open to ideas.*

Q. Is Fun Home a Broadway-style show?

A. *I'm always open to ideas, and I'm always open to great art, and I'm always open to great artists, and I always work in a way when the art is first – when it's not evident. So I maintain that what I personally do or what one does in life is with the artist, and whether it's within 10 blocks in New York City, or downtown, or in Berlin, or London, as long as what I, Carole Shorenstein Hays, do, is immaterial to any of this.*<sup>163</sup>

....

Q. After that conversation before it opened, have you ever discussed with anyone the idea of bringing Hamilton to the Curran Theatre?

A. *You know, I would love everything that I love to be at the Curran. So would I have loved Hamilton to be at the Curran, you betcha.*

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<sup>162</sup> *Id.* at 310:13–311:21.

<sup>163</sup> *Id.* at 328:2–25.

Q. Did you talk to anyone about it?

A. *I talked to the butcher, the baker, the candlestick maker.*

Q. But did you talk to the people who have any connection with Hamilton?

A. *I talk. I talk. You know, I talk. Hamilton went where it went. So I think that I am doing right by me and SHN is doing right by them. And this idea of scorched earth and I'm not allowed to talk to certain people is really kind of un-American.*<sup>164</sup>

....

Q. What other plays that we haven't discussed have you tried to bring to the Curran?

A. *I'm always in conversation and none – and I stand by what I say, that I wish everyone, everyone well and my success is no reflection on SHN's [success or] failure. They truly maintain that I had nothing whatsoever to do with this business. So why are you so focused on who I am? I just find it really fascinating that on the one hand I know nothing, but on the other hand everything I know is stolen, perched, poached. So I think you better really think about the questions in a crisper way.*<sup>165</sup>

....

Q. And tell me about the shows that, are there any shows that you're in discussions with now that have not yet been announced?

A. *For?*

Q. The Curran. And again, we can limit this to Broadway.

A. *That will be announced at – you know, it's all subjection, isn't it? Because these are shows, and this is what I do and have always done with my own personal money, I invest in artists, I nurture them. They come to Broadway, they work, they go over places. It's interesting how you just said Broadway. See, it's such a Nederlander thing, because I am like in Brooklyn, downtown, and you don't ask me about that. You wouldn't ask me about Hamilton if when I had the conversation with Oskar Eustis – so it's a very Nederlander*

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<sup>164</sup> *Id.* at 357:15–358:10.

<sup>165</sup> *Id.* at 360:9–25.

*mindset that suddenly what is on Broadway is their fiefdom – and I say, whoa, wait a second, bring it on then, you guys tell me because, you know what –*

Q. Mrs. Hays, I'm just trying to get a list. I started with Broadway because you told me earlier my question was too broad. I know that Fun Home is playing. I know Eclipsed is playing. We've talked about a number of other shows. Are there other Broadway-style shows that you have had conversations with people about bringing them to the Curran?

A. *I always have conversations –*

Q. What shows?

A. *– with people. There are numerous shows.*

Q. Tell me.

A. *I don't want to. I don't think it's any of your business whatsoever. I am pleased to answer the question. I am not hiding information. But it's my own money. I'm like free and clear. Why do I have to keep answering when I've just simply tried to get from Bob Nederlander who is behind him, who the successors are, and suddenly you have the right, the glee, the kaboom to ask me to go is that your personal e-mail – yes, we're going to emotionally water board you, we're going to keep you down as far as you can go, as though that's like what we do under the name of the law that's what you went to law school for and that you will go home and tell your wife you had a great day – that's what we're doing?*

*I'm just simply trying to do my life at the Curran, and to do community programs. Let's talk about that. Let's talk about things that I wanted to do at SHN that I couldn't, because they weren't interested in.*

*I will be having – the reason I'm doing Eclipsed is because it has, it is about the Liberian kidnapped girls. Do you know about that? I'm sure you've heard about that. This is a show that no one would bring to Broadway except someone like me who believed in it, and it's a show that my son has really picked up, and it's about art and activism, and we at the Curran, we at the Curran are going to open our doors to bring in school kids to see shows maybe for the first time, to see, to do that.*

*That's what I want to do, and that's what I want to talk about. And you want to just take my, me and my and just keep bashing it against the wall, and I'm happy to stay until the lights come up and the lights go down. Don't bother me at all. Because I've been doing this 30 years. And you know what, I'm*

*like Judy Garland, I can keep, keep, keep, – I got another song in me, and I know when I walk throughout the community, they're thrilled of what I'm doing.*

*It's – they don't look at me as being combative. They're thrilled I have a love of the Curran. I've never – I've never and I've always said to Bob Nederlander and to Greg Holland and to everyone else, this is a wonderful, wonderful, wonderful, business.*<sup>166</sup>

This is a representative but incomplete identification of Hays's ridiculous and problematic responses to questions. It appears from the cover page of the deposition transcript that the only Delaware lawyer present was an attorney representing the nominal defendant, SHN.<sup>167</sup> Two attorneys appeared at the deposition on behalf of Hays, including Brian T. Frawley, a partner with Sullivan & Cromwell LLP, and an associate from that firm.<sup>168</sup> They were both admitted *pro hac vice* in the Court of Chancery proceedings. Frawley took the lead in defending Hays's deposition. From our reading of the record (the transcript), it appears that Frawley made no attempt to put an end to Hays's flagrantly evasive, nonresponsive, and flippant answers. In fact, at one point, the examiner implored Frawley to control his own client but was rebuffed:

MR. DOLUISIO: I just want to know for the record, Mr. Frawley, I don't want this deposition to go multiple days. It will. I'm getting non-responsive answers and now I'm getting speeches. I'm trying not to be rude. I think you recognize what I'm going through here.

MR. FRAWLEY: I think you frankly deserve that one, but we'll go on.

MR. DOLUISIO: I asked her where she was employed.

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<sup>166</sup> *Id.* at 364:8–368:6.

<sup>167</sup> App. to Nederlander Reply Br. at AR002 (Hays Dep. Tr.).

<sup>168</sup> *Id.*

MR. FRAWLEY: That's not really what you asked her. But are you done, Carole.

THE WITNESS: Uh-huh.<sup>169</sup>

The trial court appropriately awarded attorneys' fees and costs for Hays's willful bad faith litigation tactics. The deposition appears to have been a colossal waste of time and resources due to her behavior, which made a mockery of the entire deposition proceeding. Although this award of fees and costs is not challenged on appeal, we write to remind counsel that they have a responsibility to intercede and not sit idly by as their client engages in abusive deposition misconduct.<sup>170</sup>

Depositions are court proceedings, and counsel defending the deposition have an obligation to prevent their deponent from impeding or frustrating a fair examination. Although counsel can be caught off guard by a client's unexpected, sanctionable outburst, that is not what happened here. Rather, Hays's flippant, evasive, ridiculous answers and

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<sup>169</sup> Hays Dep. 57:12–58:3. Hays's appellate counsel did not help matters during oral argument before this Court when he was questioned about his client's deposition behavior. Aside from repeatedly interrupting the Court and talking over the Court when the Court was raising the matter near the end of counsel's allotted time for oral argument, counsel for Hays failed to acknowledge the inappropriateness of Hays's conduct and then even tried to make an excuse for her by simply—and incorrectly—telling the Court that this was Hays's first deposition. *See* Oral Argument at 38:06–39:40, <https://livestream.com/accounts/5969852/events/8670837/videos/191018409/player/39:30>; *see also* Hays Dep. 6:23–25 (Q. “Have you ever been deposed before?” A. “Yes.”).

<sup>170</sup> *See Kaung*, 884 A.2d at 508 (holding that deposition misconduct can be “just as outrageous and unacceptable when accomplished by a non-lawyer consultant or a witness at a deposition,” and stating that “[f]or future guidance and deterrence, we emphasize that sanctions may be imposed upon anyone participating in a Delaware proceeding who engages in abusive litigation tactics”); *see also GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182, 194–95 (E.D. Pa. 2008) (sanctioning both the deponent and counsel for extremely abusive, obstructive and vulgar deposition conduct of the client, and where client's counsel “persistently failed to intercede” and “sat idly by as a mere spectator to [the client's] abusive, obstructive, and evasive behavior”).

speech-making continued throughout the entirety of the deposition, which began at 9:38 a.m. and concluded at 7:13 p.m. An attorney representing a client who engages in such behavior during the course of a deposition cannot simply be a spectator and do nothing.<sup>171</sup> Here, Hays’s counsel made no apparent effort to curb her misconduct.

Delaware counsel moving the admission of out of state counsel *pro hac vice* also bear responsibility in such a situation. They must ensure that the attorney being admitted reviews the Principles of Professionalism for Delaware Lawyers, but they must also ensure that the out-of-state counsel understands what is expected of them in managing deposition proceedings outside the courthouse so that the litigation process is not abused.<sup>172</sup> Such

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<sup>171</sup> We recognize that conferences between the attorney and deponent during the deposition should not occur except to “assert a privilege against testifying or on how to comply with a court order.” Ct. Ch. R. 30(d)(1). Parties may also make a motion “upon a showing that the examination is being conducted or defended in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party.” Ct. Ch. R. 30(d)(3); *see also Hall v. Clifton Precision*, 150 F.R.D. 525, 531–32 (E.D. Pa. 1993) (ruling that “[c]ounsel and their witness-clients shall not engage in private, off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege”).

<sup>172</sup> *See* Ct. Ch. R. 170(b) (“The admission of an attorney *pro hac vice* shall not relieve the moving attorney from responsibility to comply with any Rule or order of the Court.”); Ct. Ch. R. 170(c)(ii) (“Any attorney seeking admission *pro hac vice* shall certify the following . . . [t]hat the attorney shall be bound by the Delaware Lawyers’ Rules of Professional Conduct and has reviewed the Principles of Professionalism for Delaware Lawyers, as effective on November 1, 2003, and as amended.”); Del. Principles Professionalism for Lawyers A(4) (“A lawyer should represent a client with vigor, dedication and commitment. Such representation, however, does not justify conduct that unnecessarily delays matters, or is abusive, rude or disrespectful. A lawyer should recognize that such conduct may be detrimental to a client’s interests and contrary to the administration of justice.”). These obligations apply with equal force to lawyers who are permitted to practice in this state under a *pro hac vice* admission. *See* Ct. Ch. R. 170 (c)(ii); *Lendus, LLC v. Goede*, 2018 WL 6498674, at \*8 (Del. Ch., Dec. 10, 2018) (holding that revocation of *pro hac vice* admission is an appropriate sanction for “conduct that is repugnant to this Court’s ideals of civility and candor”); *State v. Mumford*, 731 A.2d 831, 835–36 (Del. Super. 1999) (holding that an attorney’s failure to control witness’s offensive behavior during deposition warranted revocation of *pro hac vice* admission).

abusive tactics do a disservice to our busy trial courts, to all involved in the litigation process, and ultimately they impair the truth-seeking function of the discovery process. It is hard to imagine that any reliable factual information could be mined from the Hays deposition fiasco.

Perhaps this episode can be used positively as a lesson to those training new lawyers on deposition skills. Lawyers have an obligation to ensure that their clients do not undermine the integrity of the deposition proceedings by engaging in bad faith litigation tactics; they cannot simply sit and passively observe as their client persists in such conduct. Given the restrictions on conferring with a client during deposition proceedings, these points obviously should be addressed beforehand in the deposition preparation.